Filed 8/31/06 In re Victor L. CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re VICTOR L. et al., Persons Coming Under the Juvenile Court Law.	
SAN BERNARDINO COUNTY DEPARTMENT OF CHILDREN'S SERVICES, Plaintiff and Respondent, v. GUADALUPE L., Defendant and Appellant.	E039654 (Super.Ct.Nos. J188623 – 26 & J199155) OPINION

APPEAL from the Superior Court of San Bernardino County. Robert G. Fowler, Temporary Judge. Affirmed.

Neil R. Trop, under appointment by the Court of Appeal. for Defendant and Appellant.

Dennis E. Wagner, Interim County Counsel, and Phebe W. Chu, Deputy County Counsel, for Plaintiff and Respondent.

Michael D. Randall, under appointment by the Court of Appeal, for Minors.

Guadalupe L. (mother) appeals from a juvenile court order terminating her parental rights to her five sons, Victor, Mitchell, Matthew, Joshua and Christopher, pursuant to Welfare and Institutions Code section 366.26.[1] She contends the court erred in failing both to apply the benefit exception set forth in subdivision (c)(1)(A) of section 366.26 and to consider Victor's wishes regarding adoption, in accordance with subdivision (h)(1). We conclude that mother has forfeited her right to complain on appeal as she failed to raise these issues below and, in any event, no error has been demonstrated. We therefore affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Dependency petitions as to Victor, born in February 1998, Mitchell, born in February 2001, and twins Matthew and Joshua, born in November 2001, were filed on May 22, 2003. The petitions alleged, in essence, that the boys' father, Victor L. (father), left his sons with their maternal grandmother without making arrangements for their ongoing care and supervision, and that mother knew or should have known what father had done, but had failed to assume responsibility for her children's care and supervision. The petitions also alleged that both parents had a history of drug abuse and domestic violence which impaired their ability to care for their children.

[1] All further statutory references will be to the Welfare and Institutions Code unless otherwise indicated.

On June 17, 2003, the court found the allegations of the petition to be true, declared the children dependents, and removed them from their parents' custody. Both parents were to receive reunification services. According to the report prepared for that hearing, the parents did not understand the seriousness of the allegations and blamed others for their problems. They were homeless and living in a van.

Mother herself had been declared a dependent of the court when she was 15 years old. She became pregnant with Victor a short time later, after being sexually abused by father, who was then 26 years of age. When Victor was born in 1998, mother had not yet turned 16.

By the time of the six-month review hearing in December 2003, mother was living with *her* mother, the boys' maternal grandmother. All four boys were in foster care, with Victor and Mitchell together in one home, and the twins in another. The parents were having weekly visitation with the children, which was originally supervised but later unsupervised on the basis of their "cooperative attitude" and because they had complied with drug testing with consistent negative results. However, the social worker opined that the one major obstacle to family stability was the parents' "tumultuous" relationship with each other. The court ordered continued services to the parents, with mother to have unsupervised visits, including weekend and overnight visits, if appropriate.

In February 2004 Victor was placed with mother under a family maintenance program. She had been successfully participating in unsupervised and weekend visits and had attended therapy consistently. The request for placement had been made in

anticipation of mother procuring housing through the Section 8 housing assistance program, which the social worker believed would give mother "an opportunity to have an independence that she never had before." In April, mother and Victor moved into their own apartment.

Victor was doing well in kindergarten, and mother made sure that he completed his daily homework. She was very nurturing and patient with him. The social worker also found mother to be motivated and able to persevere in pursuing her goals. Mother visited the other children on a weekly basis. The social worker seemed impressed with her progress in that she was becoming more independent.

The 12-month review hearing was held in June 2004. Three days earlier, mother delivered her fifth child, another boy, Christopher. With mother's consent, Victor was moved into respite care. The court continued Victor in mother's custody, while the three other boys were to remain in foster care.[2]

The social worker's December 2004 report indicated that after mother returned following Christopher's birth, she began to complain about the neighborhood, which was apparently infested with gangs and related violence. Unfortunately, mother's response to the gang problem did not sit well with the social worker; mother "entered into contact with various police detectives while at the same time she created and maintained relationships with the gang members." Mother eventually was forced to vacate her

apartment. No longer eligible for subsidized housing, she became involved with a man who physically abused her, after which she moved into a room in Hacienda Heights, which was paid for by father. In November she moved into a battered women's shelter, and shortly thereafter moved back in with her mother.

Meanwhile, the social worker recommended that Victor remain with mother under court supervision and that a section 366.26 hearing be set for the other three boys, with a recommendation for legal guardianship. Knowing that she would be able to have access to the children, mother seemed to be in agreement with the recommendation. In late December, after being in respite care since before Christopher was born, Victor was returned to mother, who was then sharing an apartment with others. When the social worker visited the residence, mother mentioned that she was going to allow her boyfriend to babysit the children. The social worker told mother that this was not a good idea in that her boyfriend had been physically abusive and was involved in drug sales. In response, mother asked the social worker to leave the premises and not to come back. After the police came to the apartment at the social worker's request to perform a safety check, mother became irate and told the social worker she was going to file a complaint against him. That same day, mother brought Victor and Christopher to the local police station and said she could no longer care for them. She left Victor there; however, she

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[footnote continued from previous page]

2 However, the court authorized the social worker to place Mitchell with mother "by information packet" before the next hearing, which ultimately took place on February 9, 2005. There is no indication that this placement was ever accomplished.

took Christopher with her because she was told that, since he was not a dependent of the court, she would be charged with abandonment if she left him. A week later, DCS filed petitions under sections 387 and 342 as to Victor and under section 300 as to Christopher. Both boys were detained in foster care. Victor was returned to his former foster parents, where he made a good adjustment, but he remained distressed because mother had abandoned him. As of late January 2005, mother, who was in Mexico, asked that Christopher and Victor remain in their current placements and declined reunification services.

At the hearing on February 9, 2005, the court found the allegations of the supplemental petition to be true, terminated reunification services, directed DCS to initiate guardianship proceedings, and scheduled a section 366.26 hearing for June 9, 2005. In April, the allegations of Christopher's petition were sustained, and Christopher was officially removed from parental custody.

Between February and June, however, the situation changed somewhat. Victor's foster parents opted not to pursue legal guardianship because Victor had manifested behavioral problems since his return to their home. However, the foster parents for the other boys expressed an interest in having Victor and Christopher placed with them. The recommendation of legal guardianship was therefore changed to adoption for all five boys. The prospective adoptive parents were apparently willing to maintain an open relationship with the birth parents and to allow contact with the children, which the social worker indicated was "important" for the children.

By June, the prospective adoptive parents were no longer available to adopt the children and the matter was continued—first to October and then to November—to enable DCS to find a new placement. In August, the boys were placed with paternal relatives.

According to the social worker, these five children were being given a "unique opportunity" for long-term stability and a nurturing environment, while being allowed to grow up together and maintain sibling bonds. Furthermore, it was not anticipated that the prospective adoptive parents would deprive the children from contact with their biological parents "if the latter maintain some degree of stability in their lives." Another social worker stated in her adoption assessment report that the four younger boys are too young to understand the concept of adoption; however, Victor understands adoption "in a limited way, and he reports that, he is happy he is staying with his prospective adoptive parents." The prospective adoptive parents have three daughters, ages 12, 15 and 17.

The section 366.26 hearing proceeded on November 16, 2005. Mother was not present and no affirmative evidence was submitted on her behalf. During argument, counsel for mother said he was "objecting only for the record." Finding there was clear and convincing evidence that the children will be adopted, the court terminated parental rights. Although the court did not expressly find that none of the exceptions applied, an implied finding is reflected by its written order.

DISCUSSION

A. Forfeiture.

DCS contends that, because none of the issues raised by mother were raised at the trial court level, they have been forfeited and cannot be raised for the first time on appeal. (*In re Aaron B.* (1996) 46 Cal.App.4th 843, 846; *In re Crystal J.* (1993) 12 Cal.App.4th 407, 411-412.) We agree. "[A] reviewing court ordinarily will not consider a challenge to a ruling if an objection could have been but was not made in the trial court. [Citation.] The purpose of this rule is to encourage parties to bring errors to the attention of the trial court, so that they may be corrected. [Citation.] [¶] Dependency matters are not exempt from this rule." (*In re S.B.* (2004) 32 Cal.4th 1287, 1293, fn. omitted.)

Of course, neither a question of law which can be decided on undisputed facts, nor a claim that there is insufficient evidence to support a judgment, is subject to forfeiture. (*In re P.C.* (2006) 137 Cal.App.4th 279, 287.) Thus, arguing that the juvenile court's order selecting adoption as a permanent plan for Victor "was based upon legally insufficient evidence of Victor's informed position regarding adoption," and its failure to apply the benefit exception constituted a violation of her fundamental constitutional rights, mother contends the rule is inapplicable here. We are not persuaded that the issues raised by mother are legal questions.

When a parent at a section 366.26 hearing fails to assert subdivision (c)(1)(A) as a basis for precluding termination of parental rights, he or she forfeits the issue on appeal. (*In re Erik P.* (2002) 104 Cal.App.4th 395, 402-403.) The rationale is that the failure "not only . . . deprive[s] the juvenile court of the ability to evaluate the critical facts and make the necessary findings, but it also deprives this court of a sufficient factual record

from which to conclude whether the trial court's determination is supported by substantial evidence. [Citation.] Allowing the [parent] to raise the exception for the first time on appeal would be inconsistent with this court's role of reviewing orders terminating parental rights for the sufficiency of the evidence." (*Id*. at p. 403; see also *In re Melvin A.* (2000) 82 Cal.App.4th 1243, 1252 [juvenile court has no obligation to consider applicability of beneficial relationship exception sua sponte].) Furthermore, the parent has the burden of proving that termination would be detrimental to the child. (*In re Jasmine D*. (2000) 78 Cal.App.4th 1339, 1350) Mother's counsel made no attempt to argue at the section 366.26 hearing the applicability of the subdivision (c)(1)(A) exception. The issue is therefore forfeited.

Likewise, with respect to her contention the termination order was based upon legally insufficient evidence of Victor's informed position regarding adoption, mother insists she is not seeking reversal simply because the trial court admitted into evidence a deficient assessment report, but rather because the trial court made its findings and order without the support of sufficient evidence. We disagree with mother's characterization of the issue as one challenging the sufficiency of evidence. What she is really arguing is that the juvenile court failed to perform its statutory duty to consider the child's wishes. This contention is waivable and, by virtue of her failure to address it below, it is waived. Accordingly, we conclude that by failing to raise the adequacy of the report below, mother forfeited this issue.

But even if these issues are not deemed forfeited, mother's contentions lack merit.

B. Applicability of section 366.26, subdivision (c)(1)(A) benefit exception.

Section 366.26, subdivision (c)(1), provides for the termination of parental rights if family reunification services have been terminated and the juvenile court finds by clear and convincing evidence that the child is likely to be adopted. Once reunification services have been terminated, " '[f]amily preservation ceases to be of overriding concern . . . [and then] the focus shifts from the parent's interest in reunification to the child's interest in permanency and stability.' [Citation.]" (*In re Richard C.* (1998) 68 Cal.App.4th 1191, 1195.) "Adoption, where possible, is the permanent plan preferred by the Legislature." (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 573.)

When as here, the court finds by clear and convincing evidence that the child is likely to be adopted, the court must terminate parental rights and order the child placed for adoption "unless it 'finds a compelling reason for determining that termination would be detrimental to the child due to one or more' of specified circumstances." (*In re Celine R.* (2003) 31 Cal.4th 45, 49.) The parent opposing termination has the burden of showing that termination would be detrimental to the minor under one of the specified statutory exceptions. (*In re L.Y.L.* (2002) 101 Cal.App.4th 942, 949; *In re Zachary G.* (1999) 77 Cal.App.4th 799, 809.) The exception relevant here provides as follows: "The parents . . . have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship." (§ 366.26, subd. (c)(1)(A).) It is the parent's burden to show that these exceptional circumstances apply. (*In re Derek W.* (1999) 73 Cal.App.4th 823, 826.)

We review the juvenile court's ruling on whether an exception applies to termination of parental rights pursuant to section 366.26 for substantial evidence. (*In re Autumn H., supra,* 27 Cal.App.4th at p. 576; *In re Cliffton B.* (2000) 81 Cal.App.4th 415, 424-425.) Under this standard, an appellate court must affirm the juvenile court's order if there is evidence that is reasonable, credible, and of solid value to support the order (*In re Christina A.* (1989) 213 Cal.App.3d 1073, 1080), and the evidence must be considered "in the light most favorable to the prevailing party, giving the prevailing party the benefit of every reasonable inference, and resolving all conflicts in support of the order." (*In re Autumn H., supra*, 27 Cal.App.4th at p. 576.)

However, some courts have applied the abuse of discretion standard. (See, e.g., *In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1351 [applying parental benefit exception is a "quintessentially discretionary determination."].) "The practical differences between the two standards of review are not significant. '[E]valuating the factual basis for an exercise of discretion is similar to analyzing the sufficiency of the evidence for the ruling. . . , Broad deference must be shown to the trial judge. The reviewing court should interfere only "'if [it] find[s] that under all the evidence, viewed most favorably in support of the trial court's action, no judge could reasonably have made the order that he did.'. . . . " [Citations.]" (*Ibid*.)

For the exception to apply, the parent must have maintained regular visitation with the child, and the juvenile court must determine that the parent/child relationship "promotes the well-being of the child to such a degree as to outweigh the well-being the

child would gain in a permanent home with new, adoptive parents. In other words, the court balances the strength and quality of the natural parent/child relationship in a tenuous placement against the security and the sense of belonging a new family would confer." (*In re Autumn H., supra*, 27 Cal.App.4th at p. 575.) To overcome the benefits associated with a stable, adoptive family, the parent seeking to invoke the section 366.26, subdivision (c)(1)(A) exception must prove that severing the relationship will cause not merely *some* harm, but *substantial* harm to the child. (*In re Brittany C*. (1999) 76 Cal.App.4th 847, 853.) Similarly, "the exception does not permit a parent who has failed to reunify with an adoptable child to derail an adoption merely by showing the child would derive *some* benefit from continuing a relationship maintained during periods of visitation with the parent." (*In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1348; italics added.)

On the record before us, mother has failed to meet her burden. To support the first prong of the statute, i.e., maintaining regular visitation and contact with the child, she points to a statement in a June 2005 report that she had always been involved with her children and had been in contact with them as much as the circumstances of her lifestyle had permitted. In our view, this, without more, is insufficient to satisfy the first prong. Mother concedes that the record reveals an interruption in visitation during the last stage of the dependency due to tumultuous events in her life, but argues that during the vast majority of the dependency, she was steadfast in maintaining contact with her children. Although the statute does not specify "recent" visitation and contact, we think the term is

implicit and that the relationship must be a current one. Indeed, without a current relationship, there is no relationship to be preserved. Thus, mother has not met the first step.

In any event, there is insufficient evidence that the children would benefit from continuing a relationship with mother. That mother may have had a relationship with her sons in the past does not detract from the reality that any relationship has since collapsed. Conceding that she has made mistakes, such as leaving Victor and Christopher at the police station because she believed she could no longer care for them, she argues "these mistakes do not erase the fact that Victor had a long standing bond with his mother." We disagree. While mother's mistakes may not necessarily erase the fact a bond existed *at one time*, they certainly do affect the continuing existence of any bond. Indeed, mother ignores the reality that abandoning Victor at the police station had a lasting detrimental effect upon him, as evidenced by his apparent fear, when placed with his prospective adoptive parent, that he would again be rejected. Nonetheless, mother contends "[t]he issue is not whether the children should be returned to the care of their mother but rather whether the legal relationship between parent and child should survive so that these children can be assured of an ongoing relationship with their mother, however limited, over the years." If this were true, it would apply in virtually every dependency case. But it is not the law.

Mother seems to dwell on the fact the social worker initially recommended legal guardianship as the permanent plan, to "allow the family to maintain its pre-established

bonds and the children [to] enjoy the care of their mother without the strain of all living in the same environment. Actually this sort of shared parenting with a foster mother that has been very genuine towards the children's mother may be the best available solution in this case."

Acknowledging that the recommendation was changed to adoption at some point between the 12 month review hearing and the 18 month review hearing, she argues "there nonetheless had to be a legally founded basis for determining the children were unadoptable and would be better served by guardianship." She contends the social worker's "recurring reference to the bonds within this family made it obvious that [DCS] felt that the (c)(1)(A) beneficial relationship exception to adoption existed in this case." But this recommendation was made first in June 2004 and again in December 2004. We disagree with mother's suggestion that any long-term, nontransitory relationship she had with her children, which may have been worth preserving during 2004, could not have been dissolved "when the court selected the permanent plan of adoption on February 23, 2005."

Initially, we note that the court did not select the permanent plan of adoption in *February* 2005; rather, parental rights were terminated in *November* 2005. Furthermore, the recommendation was changed from legal guardianship to adoption in June 2005, at the time the foster parents for the three middle boys expressed a willingness to care for the other two boys as well.

But more importantly, circumstances do change, sometimes for the worse, and when they do, permanent plan recommendations change with them. In that regard, we cannot overlook the fact that, in December 2004, mother attempted to relinquish custody of Victor and Christopher when she set out to abandon them at the police station. Further, she was in Mexico for several months early in 2005 and was incarcerated twice during the first six months of that year, thereby restricting her visits with the children.

Thus, although mother participated in reunification services and visited the children regularly during the first 12 months, her motivation began to wane beginning in the latter part of 2004—and any chance for reunification was virtually eliminated at the same time. Accordingly, we discern no error in the juvenile court's conclusion that the beneficial parental relationship exception was inapplicable in this case.

C. Knowledge of Victor's wishes regarding adoption or other permanent plan.

Pursuant to section 366.26, subdivision (h), the court must "'consider the child's wishes to the extent ascertainable'" prior to terminating parental rights. (*In re Leo M.* (1993) 19 Cal.App.4th 1583, 1591.) But the evidence need not be in the form of direct testimony in court or chambers; it can be found in court reports prepared for the hearing. (*Ibid*.) Indeed, what the court must strive to do is "to explore the minor's feelings regarding his/her biological parents, foster parents, and prospective adoptive parents, if any, as well as his/her current living arrangements. . . . [A]n attempt should be made to obtain this information so that the court will have before it some evidence of the minor's feelings from which it can then infer his/her wishes regarding the issue confronting the court." (*Id*. at p. 1592.)

Here, there was a reasonable basis for inferring the minor's wishes. Although we cannot be sure what the social worker meant when she stated that Victor "understands Adoption, in a limited way," the adoption assessment report indicates that Victor was happy living with his prospective adoptive parents, that "[h]e was amazed and very grateful when he received his new clothes for school," and "he is always happy to get out of bed and go to school." Thus, Victor seemed to be thriving in his new home. Moreover, as DCS points out, his question to his paternal aunt, "'you promise I do not have to go back and forth anymore' speaks volumes as to exactly just how well he understands the goal of adoption - to provide him with the opportunity for stability that his parents have thus far failed to provide him." We disagree with mother's contention

that, while Victor's question does demonstrate his desire for stability, it does not demonstrate he understands there are other permanent plan paths to stability and that adoption would entail a complete and permanent severance of his relationship with his mother. As stated in *In re Leo M., supra* , 19 Cal.App.4th 1583, 1591, "To ask children with whom they prefer to live or to ascertain what they wish through other evidence is one thing. To ask those children to choose whether they ever see their natural parent again or to give voice to approving that termination is a significantly different prospect… . . . [W]e conclude that in considering the child's expression of preferences, it is not required that the child specifically understand the proceeding is in the nature of a termination of parental rights." (*Id.* at p. 1593.)

Similarly, in *In re Amanda D.* (1997) 55 Cal.App.4th 813, 819-820, a father was precluded from arguing on appeal that the court should have obtained the children's testimony regarding their wishes for a permanent plan because he failed to raise it below. But the court addressed the issue nonetheless, and found that he could not prevail on the merits. The court concluded there was a reasonable basis for inferring the minors' wishes in that they spoke about how much they liked living with their foster parents. And so it is here. Although the court did not question Victor directly, and the adoption assessment report indicates only that his knowledge of adoption was "limited," we are satisfied from the record that this sensitive young boy had no desire to continue the lifestyle he was experiencing when he moved back and forth between mother and various foster homes. Mother cites *In re Diana G.* (1992) 10 Cal.App.4th 1468, 1480 for the proposition the

record *must* include evidence reflecting the child's awareness that the proceeding involves the termination of parental rights. As indicated above, however, contrary views are expressed in both *Leo M.* and *Amanda D.*, which we find to be more realistic.

Finally, Victor had appointed counsel who appeared at the hearing and affirmatively joined in DCS's arguments. Counsel made it clear at the section 366.26 hearing that Victor and his brothers were happy where they were and were doing well. The duties of a court-appointed attorney for a child in a dependency proceeding are statutorily described and compelled. Pursuant to section 317, subdivision (e),[3] when the child is at least four years of age, the attorney is required to interview him or her to determine his or her wishes and to assess the child's well-being. As in *In re Jesse B.*

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[3] Section 317, subdivision (e) states: "The counsel for the child shall be charged in general with the representation of the child's interests. To that end, the counsel shall make or cause to have made any further investigations that he or she deems in good faith to be reasonably necessary to ascertain the facts, including the interviewing of witnesses, and he or she shall examine and cross-examine witnesses in both the adjudicatory and dispositional hearings. He or she may also introduce and examine his or her own witnesses, make recommendations to the court concerning the child's welfare, and participate further in the proceedings to the degree necessary to adequately represent the child. In any case in which the child is four years of age or older, counsel shall interview the child to determine the child's wishes and to assess the child's well-being, and shall advise the court of the child's wishes. Counsel for the child shall not advocate for the return of the child if, to the best of his or her knowledge, that return conflicts with the protection and safety of the child. In addition counsel shall investigate the interests of the child beyond the scope of the juvenile proceeding and report to the court other interests of the child that may need to be protected by the institution of other administrative or judicial proceedings. The attorney representing a child in a dependency proceeding is not required to assume the responsibilities of a social worker and is not expected to provide nonlegal services to the child. The court shall take whatever appropriate action is necessary to fully protect the interests of the child."

(1992) 8 Cal.App.4th 845, "[w]e must assume in the absence of record evidence to the contrary that [Victor's] counsel complied with the code's mandate and consulted, to the extent feasible, with his young client before urging the juvenile court to terminate parenthood. Accordingly, the juvenile court could properly conclude the little boy - assuming he had the capacity to reason and form an intelligent preference - did not have a contrary wish. [Citation.]" (*Id*. at p. 853.) We therefore conclude there was sufficient evidence upon which the court could assess Victor's wishes as well as his best interests.

DISPOSITION

The order terminating parental rights is affirmed.[4]

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

/s/ MILLER
J.

We concur:

/s/ RICHLI
Acting P. J.

/s/ GAUT
J.

[4] In light of our affirmance, we need not address mother's final contention that if Victor or any of his brothers is found not to be adoptable, then all of the boys are unadoptable by virtue of their sibling bond. (§ 366.26, subd. (c)(1)(E).)